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IN THE

Supreme Court of the United States

October Term, 1958

No. 185

GERTRUDE ARRINGTON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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To the Honorable Chief Judge and Associate Judges of the Supreme Court:

The petitioner, addressing herself to the Court through her counsel, T. Emmett McKenzie, of Washington, D.C., prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the District of Columbia Circuit entered on June 5, 1958, affirming the judgment of the District Court of the United States for the District of Columbia, under which the District Court aforesaid denied the petitioner's motion for the restoration of certain papers and money and to restrain the use in evidence; against your deponent, of the aforementioned papers and money; which motion was filed prior to any indictment returned.

OPINIONS BELOW

The opinion of the Circuit Court below has not been printed. A copy thereof has been made part of the record filed in this Court (Appendix 25).

There is also set forth in the record a copy of the opinion of the Trial Court. This opinion has not yet been reported. (Append. 25-29).

JURISDICTION

The judgment of the Court below was entered on June 5, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

The question presented is:

Does Rule 41(e), Federal Rules of Criminal procedure bar the right of a person accused of crime in a Federal Court to petition a Trial Court to enjoin and restrain the use of evidence illegally seized—where such motion is filed prior to indictment?

CONSTITUTION

AMENDMENT IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, * * *.

AMENDMENT V:

> No person * * * shall be compelled in any criminal case to be a witness against himself, * * *.

JURISDICTION AND METHOD OF REVIEW BELOW

Title 17-101 District of Columbia Code, 1940 Edition provides as follows:

Any party aggrieved by any final Order, judgment or decree of the District Court of the United States for the District of Columbia * * * may appeal therefrom to the said United States Court of Appeals for the District of Columbia; and upon such appeal the United States Court of Appeals for the District of Columbia shall review such Order, judgment, or decree, and affirm, reverse, or modify the same as shall be just, * * *.

RULES OF CRIMINAL PROCEDURE

41(e) MOTION FOR RETURN OF PROPERTY AND TO SUPPRESS EVIDENCE

A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

STATEMENT

The proceedings in the trial Court were as follows:

1. Heretofore, on January 23, 1958, one Private Jack Evans, Metropolitan Police Department Officer, made af-

fidavit before James F. Splain, United States Commissioner for the District of Columbia. A copy thereof is attached hereto and made part hereof. Search warrants for the premises 1229 Seventh Street, N.W., and the premises 614 N Street, N.W., Washington, D.C., issued.

2. The affidavit purports to be supported by a document bearing the title

> Statement of Facts relative to request for U.S. Commissioner's search Warrants and Arrest Warrants as indicated below for violations of the lottery laws of the District of Columbia,

wherein the aforesaid Officer Evans relates in substance that commencing on January 6, 1958, he was assigned to investigate premises 1229½ Seventh Street, N.W.,—a suspected numbers operation; that on the 6th of January, at said address he made certain observations indicating operation of a numbers lottery not involving your deponent nor the premises 614 N Street, N.W.

3. That on January 8, 1958, he again made observations indicating possibility of a numbers operation at 1229½ Seventh Street, N.W., not involving your deponent nor the premises 614 N Street, N.W.

4. That on January 9, 1958, at 1229½ Seventh Street, N.W., he observed activities indicating that possible operation of a numbers lottery not involving your deponent nor the premises 614 N. Street, N.W.

5. That on January 10, 1958, at 1229½ Seventh Street, N.W., he observed activities indicating the possibility of the operation of a numbers lottery not involving your deponent nor the premises 614 N Street, N.W.

6. That on January 11, 1958, at 1229½ Seventh Street, N.W., he observed activities indicating the possibility of the operation of a numbers lottery not involving your deponent nor the premises 614 N Street, N.W. On this

date the said Officer Evans observed one of the persons whom he alleges was engaged in the operation at 1229½ Seventh Street, N.W., enter 614 N Street, N.W. remaining a short period of time and depart for a destination unknown. There is no allegation the last mentioned person performed any act at 614 N Street, N.W., nor that he made any contact with your deponent.

7. On January 13, 1958, at 1229½ Seventh Street, N.W., the said Officer alleged he observed activities therein indicating the possibility of the operation of a numbers lottery not involving your deponent nor the premises 614 N Street, N.W. The said Officer Evans further alleges that on that date one of the persons alleged as being engaged in the operation of a numbers lottery at 1229½ Seventh Street, N.W., was subsequently seen coming out of the premises 614 N Street, N.W.

8. On January 14, 1958, at 1229½ Seventh Street, N.W. Officer Evans alleges he observed activities indicating the possibility of the operation of a numbers lottery not involving your deponent nor the premises 614 N Street, N.W. On that date Officer Evans further alleges that one of the persons whom he has alleged was concerned with the activities in 1229½ Seventh Street, walked down the street and passed the premises 1229½ Seventh Street, N.W. that he was followed to 614 N Street, N.W., where he remained approximately 8 minutes; left 614 N Street, N.W., and returned to 1229½ Seventh Street, N.W.

9. The premises 614 N Street, N.W. are occupied by a Valet Shop doing business and trading under the name of "Roy's Valet".

10. On January 15, 1958, at 1229½ Seventh Street, N.W., Officer Evans alleges that he observed activities indicating the possibility of the operation of a numbers lottery not involving your deponent nor the premises 614 N Street, N.W.

11. On January 16, 1958, in the premises 1229½ Seventh Street N.W., Officer Evans alled that he observed activities indicating the possibility of the operation of a numbers lottery not involving your deponent nor the premises 614 N Street, N.W.

12. That on January 17, 1958, at 1229½ Seventh Street, N.W. Officer Evans alleged that he observed activities indicating the possibility of the operation of a numbers lottery not involving your deponent nor the premises 614 N Street, N.W.

13. On January 18, 1958, at 1229½ Seventh Street, N.W., Officer Evans alleged that he observed activities indicating the possibility of the operation of a numbers lottery not involving your deponent nor the premises 614 N Street, N.W. On this date Officer Evans further alleges that one of the persons alleged to be concerned in the activities at 1229½ Seventh Street, N.W. was followed to 614 N Street, N.W., where she remained shortly and departing returned to 1229½ Seventh Street, N.W.; and he further alleges that a paper bag in her possession when she left 1229½ Seventh Street, N.W. did not seem to be in her possession when she emerged from 614 N Street, N.W.. Your deponent is not mentioned in this connection with this matter.

14. On January 20, 1958, at 1229½ Seventh Street, N.W., Officer Evans alleges that he observed activities indicating the possibility of the operation of a numbers lottery not involving your deponent nor the premises 614 N Street, N.W.

14-A. On January 21, 1958, at 1229 Seventh Street, N.W., Room 3, Officer Evans alleges he observed activities indicating the possibility of the operation of a numbers lottery not involving your deponent nor the premises 614 N Street, N.W.

15. On January 22, 1958, at 1229 Seventh Street, N.W. Officer Evans alleges that he observed activities indicating the possibility of the operation of a numbers lottery.

16. The original of this affidavit and the statement of facts, supra is attached to and is part of the search warrant issued for 1229 Seventh Street, N.W. and a carbon copy exact in every respect is made the basis for the issuance of the search warrant against your deponent.

17. This affidavit on the purported statement of facts contain not a scintilla of personal knowledge establishing that defendant was then engaged in the operation of a numbers lottery. Further, while the purported statement of facts bears the seal and signature of Commissioner Splain it is not an affidavit nor does it state in any place or manner that the statements appearing therein are true to the personal knowledge of the said Officer Evans.

18. The application for warrant was approved and search warrant issued, a copy thereof is set forth infra as is copy of the supporting statement.

19. An examination of the supporting statement shows upon that face thereof (p. 3—statement) that it is doubtful that the document can be referred to as a true affidavit.

20. The warrant was duly executed and the sum of $132.00 in bills was taken from petitioner's purse. As per the return "a quantity of numbers slips and rundown tapes" was taken from the premises.

21. The place searched was a public Valet Shop wherein petitioner and one other person were working, and the said numbers paraphernalia were not taken from the person of your petitioner.

22. Your petitioner was arrested at the time the search warrant was executed and on January 27, 1958, appeared before the United States Commissioner for the District of Columbia, ostensibly to be given a preliminary hearing. At that time petitioner, through counsel, moved the United States Commissioner to discharge her from custody and to quash the search warrant. The record does not show that there was a warrant of arrest for this petitioner.

The motion was denied for the reason the arresting and searching officers were absent and no District Attorney was present.

The proceedings before the Commissioner were reported and and a copy thereof appears immediately below.

DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

OFFICE OF THE UNITED STATES COMMISSIONER

PRELIMINARY HEARING

CASE NO. 2412

UNITED STATES OF AMERICA

vs.

GERTRUDE ARRINGTON

CASE NO. 2411

UNITED STATES OF AMERICA

vs.

LONNIE HOWARD

Washington, D. C., January 27, 1958

The above-entitled cause came on for preliminary hearing before Honorable JAMES F. SPLAIN, United States

Commissioner, in Room 1426, U. S. Court House, Washington, D.C., at 10:30 a.m.

APPEARANCES:

T. EMMETT McKENZIE, Esquire
The Century Building
412 Fifth Street, N.W.
Washington 1, D.C.
for Defendant Gertrude Arrington

JOSEPH SITNICK, Esquire
401 Third Street, N.W.
Washington, D.C.
for Defendant Lonnie Howard

P R O C E E D I N G S

DEPUTY MARSHAL: This is Commissioner's Case No. 2412; Gertrude Arrington is defendant number 1 and defendant number 2 is Lonnie Howard.

MR. McKENZIE: Those are two different cases.

DEPUTY MARSHAL: No, they are both under the same affidavit and will be taken together.

You two defendants have been charged for violation of the D. C. Code, Title 22, Section 1501 and 1502. This complaint charges each of you on January 24th were arrested for unlawfully promoting lottery and possessing number slips and rundown tapes.

You are each advised any statements you make may be used against you at this time or at any subsequent hearings in this case. You each have a right to retain counsel and each of you is entitled to a hearing before Commissioner Splain, the Committee Magistrate in these cases, at which hearing you and your counsel have a right to, and may, introduce testimony in your own behalfs.

Defendant Arrington is represented by Mr. McKenzie, and defendant Howard is represented by Mr. Sitnick.

MR. McKENZIE: May I address the Court with respect to defendant Arrington?

COMMISSIONER SPLAIN: Yes.

MR. McKENZIE: She was arrested pursuant to a search made on case No. 2412, Commissioner's Docket No. 5. You issued that search warrant, sir, upon the affidavit of one Private Jack Evans on the 24th day of January, 1958.

On the same day in case No. 2411, you issued a search warrant upon the affidavit of Private Jack Evans, Member of the Metropolitan Police Department.

These two affidavits in support of these warrants, 2412 to search 614 N Street, Northwest, naming no person, and 2411 to search the premises 1229 Seventh Street, are identical. There isn't anything in the affidavit attached to the search warrant in case No. 2412 which purports to indicate that any violation of law has taken place by anybody in these premises or at those premises when the officers made the arrest. It hardly comes to the dignity of concession or surmise; it is a bald guess. There is no necessity for taking testimony. There is no testimony you can get or hear which will relate back to the 24th of January.

Because of the clear deficiency of legality of the affidavit, I move now to quash this warrant and discharge this defendant from custody. She was committing no offense before an officer; there is no warrant for her arrest; and the search warrant is illegal and void.

That is all I have to say.

COMMISSIONER SPLAIN: In the absence of the United States District Attorney and officers, I will continue the case to give them an opportunity to look at it and for me to look at it; so, your case will be continued for two weeks.

MR. McKENZIE: Perhaps we can all agree on a date so the Officers can be here on the same date for these two defendants rather than coming on different dates.

MR. SITNICK: I just spoke to the Officers about a date.

COMMISSIONER SPLAIN: How about Tuesday or Thursday, two weeks from now?

MR. SITNICK: I was going to suggest February 20, bearing in mind my own commitments and the convenience of the Officers.

COMMISSIONER SPLAIN: Maybe you can agree on that date, Mr. McKenzie?

MR. McKENZIE: I would be very glad to cooperate. I like to cooperate when I can.

COMMISSIONER SPLAIN: All right. That will be set for the 20th of February.

MR. McKENZIE: At the present time this defendant is discharged to return on the 20th?

DEPUTY MARSHAL: She is being arraigned for the first time. Bond had been set.

COMMISSIONER SPLAIN: It has to be renewed, Mr. Marshal. Both these parties have to be fingerprinted and then swear to the bonds and be released.

(Whereupon, at 10:37 o'clock a.m., the hearing in the above-entitled matter was continued until February 20, 1958.)

---

23. Thereupon your petitioner filed the motion which is the subject of the litigation in its present state for it cannot be contradicted that the probable cause which the law demanded, had to exist before the issuance of the warrant, was contained, in toto, within the confines of the statement of facts, supra. Nothing could be added under the rules of due process on January 27, 1958, the date of the hearing, to enlarge or amend the statement of facts dated January 23, 1958.

24. Your petitioner being certain her arrest and de-

tention, without warrant, and the seizure heretofore referred to were both illegal and in violation of petitioner's right under the Constitution of the United States to be free from unreasonable searches and seizures; and being gravely apprehensive that unless the relief she sought was granted forthwith and prior to any presentation of the matter before a grand jury; and realizing that irremediable harm would occur to her if the alleged use of the said papers and documents by the Government was permitted; and being further apprehensive that by reason of the refusal and failure of the United States Commissioner to grant her the hearing required by law was constrained to proceed in the manner heretofore described there being no other remedy then available to her.

25. Aforesaid motion to enjoin and restrain was answered by the United States District Attorney (R. 17-22) who took the position the relief sought by petitioner had no support in law, and that in any event the document referred to as a statement of facts, supra, and (R. 13-17) established the probable cause required by the fourth amendment to the Constitution of the United States and of the statutes relating to search warrants.

26. Thereafter the Trial Court filed a memorandum opinion, (R. 24-28) in which it held as the crux of its determination;

> " * * * About 2:25 P.M. Jane Doe #2 came downstairs and entered 1229½ 7th St. N.W. with a brown paper bag in her hand. At this time an unidentified colored male placed a bet with her. Jane Doe #2 took from the bag a regulation number book and recorded the bet. After this, she took a smaller bag out of the brown bag and placed a copy of the slip in this bag. She placed a book in her coat pocket, then neatly folded the bag of slips. She placed them under her coat, which she held in place with folded arms. Jane Doe #2 then left the Cafe and was followed by officer Evans to 614 N St., N.W., her hands free, adjusting her cap with both hands and her coat was open. The bag which she had taken into 614 N St.,

N. W. was not seen, nor was there a bulge in her coat pocket."

In further support of the opinion the Trial Court concluded:

> It is the Court's opinion that this sufficiently distinguishes the instant case from the *Price* situation to warrant a different result.
>
> It should be further noted that the bag Jane Doe #2 carried and what was in it is very definitely identified. Not only is there the allegation in the affidavit that "on all occasions where a brown paper bag is mentioned, it is believed by the undersigned that they contained number slips or other gambling paraphernalia", but also on four other occasions mentioned in the affidavit Officer Evans saw slips placed in a paper bag and the bag folded. On the occasion when Jane Doe #2 went into 614 N Street, N.W. with a paper bag, there can be no doubt that the bag contained numbers slips. Her emergence without the bag, coupled with the other circumstances mentioned above, in the Court's opinion warrants a finding of probable cause.
>
> The motion is denied.

/s/ LUTHER W. YOUNDAHL
JUDGE

March 1958

27. Appeal was duly noted and a proper record on appeal transmitted to the Circuit Court of Appeals below.

28. Prior to the date upon which the brief supporting the position of the appellant below was required to be filed, the United States filed Motion to affirm or dismiss (Supp. Tr. 1-5).

The appellant below filed answer to the motion to affirm or dismiss (Supp. Tr. 6-9) and the appellee below filed a reply to appellant's said Answer (Tr. 11-13).

29. Thereupon the Circuit Court of Appeals below entered the following Judgment (Supp. Tr. 14).

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 14,459 APRIL TERM, 1958

District Court
Grand Jury No. 194-58

Gertrude Arrington, Appellant,

v.

United States of America, Appellee.

Before: Edgerton, Chief Judge, and Washington and Danaher, Circuit Judges, in Chambers.

ORDER

Upon consideration of appellee's motion to affirm or dismiss; and of appellant's answer, it is

ORDERED by the Court that the judgment of the District Court appealed from herein be, and it is hereby, affirmed.

Dated: June 5, 1958.

Per Curiam.

UNITED STATES DISTRICT COURT
For the District of Columbia

Commissioner's Docket No. 5
Case No. 2412

SEARCH WARRANT

UNITED STATES OF AMERICA

v.

614 N Street, N.W., entire first floor, occupied by Roy's Valet

To Chief of Police, D.C., or any other officer, Metropolitan Police, DC

Affidavit having been made before me by Pvt. Jack Evans, Morals Div., MPDC, that he has reason to believe that on the premises known as 614 N Street, N.W. (entire first floor) Washington, D.C. in the District of Columbia there is now being concealed property, namely lottery tickets, lottery policies, or any book, paper, memorandum or device used in setting up, promoting, or maintaining a policy lottery. The facts to sustain this are as set forth in the Affidavit attached hereto and made a part hereof. which are in violation of D.C. Code Title 22, Sections 1501 and 1502, and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the premises above described and that the foregoing grounds for application for issuance of the search warrant exist.

You are hereby commanded to search forthwith the place named for the property specified, serving this warrant and making the search in the daytime and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken,

and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date, as required by law.
Dated this 23rd day of January, 1958.

/s/ JAMES F. SPLAIN

Statement of Facts relative to request for U. S. Commissioner's search Warrants and Arrest Warrants as indicated below for violations of the lottery laws of the District of Columbia.

Search Warrants:

1229 7th Street, N.W., Washington, D.C., third floor, Room 3, occupied by Johnnie White.
614 N Street, N.W., Washington, D.C., entire first floor, occupied by Gertrude Crowell on plate glass window "Roy's Valet"

ARREST WARRANTS:

John Doe #1, colored male, called "Johnnie" 30 yrs. 5'10", 189 lbs. medium brown skin

Johne Doe #2, Colored male, called "Lewis", 40 yrs, 5'8", 170 lbs, medium brown skin

Jane Doe #1, Colored female, called "Edna", 40 yrs., 5'6" 145 lbs, brown skin

Jane Doe #2, Colored female, called "Cora", 35-40 yrs, 130 lbs, medium brown skin

A complaint was received in the office of the Morals Division of lottery violations in the 1200 block of 7th Street, N.W.

About 2:00 P.M., January 6, 1958, officers Evans, assigned to the Morals Division, MPDC, made number bets with Jane Doe #1 in 1229½ 7th Street, N.W. Jane Doe #1 then left the premises, returned a few minutes later and gave Officer Evans a carbon copy of his number bets, this copy was from a regulation number book with his bets recorded on same.

About 12:20 P.M. January 8, 1958, while Officer Evans was in Cafe located at 1229½ 7th Street, N.W. he made two number bets with Jane Doe #1. He gave her $.25 in payment for same. Jane Doe #1 handed these bets to Jane Doe #2, who recorded these bets on a regulation number book and gave the duplicate copy back to Jane Doe #1. Jane Doe #1 then gave the copy to Officer Evans.

About 12:40 P.M. January 9, 1958, Officer Evans was in the Cafe located 1229½ 7th Street, N.W. and observed Jane Doe #2 writing numbers in a regulation number book. Officer Evans bet two numbers with Jane Doe #2 and gave her $.30 to cover these bets. Jane Doe #2 recorded these bets in the regulation number book and gave Officer Evans a duplicate slip.

About 11:55 A.M. January 10, 1958, Officer Evans was in the Cafe located at 1229½ 7th Street, N.W. and observed Jane Doe No. 2 in the premises. He gave her two number bets and paid her $.30 in payment of same. Jane Doe #2 recorded these bets in a regulation number book and gave Officer Evans a duplicate copy.

About 1:00 P.M. January 11, 1958, Officer Evans was in the Cafe located at 1229½ 7th Street, N.W. and observed Jane Doe #2 in the premises. He gave her two number bets and paid her $.30 in payment of same. Jane Doe #2 recorded these bets in a regulation number book and gave Officer Evans a duplicate copy. A few minutes later Jane Doe #2 left the premises. Officer Evans observed John Doe #1, whom he had observed on previous dates, assisting Jane Doe #2 in her numbers actively in the premises. John Doe #1 wrote a number on a blank piece of paper for Officer Evans, then gave him $.10 in payment for the bet. About the same time Jane Doe #2 reentered the premises. John Doe #1 gave her the money and the number bet. Jane Doe #2 recorded the bet in a regulation number book, gave the duplicate slip to John Doe #1, who in turn gave the slip to Officer Evans. About 2:32 P.M. Officer Evans observed John Doe #1 entering 614 N Street, N.W., which is a known numbers drop location. About 2:35 P.M. Officer Evans observed John Doe #1 leave 614 N Street, N.W.

About 12:45 P.M. January 13, 1958, while in the Cafe located at 1229½ 7th Street, N.W., officer Evans made number bets with Jane Doe #2. He paid her $.30 for these bets. These bets were recorded in a regulation number book and a duplicate copy was given to Officer Evans by Jane Doe #2. John Doe #1 and Jane Doe #2 were having a conversation, John Doe #1 left the premises. About 10 minutes later he was seen by Officer Evans coming out of 614 N Street, N.W.

About 12:43 P.M. January 14, 1958, while in the cafe located at 1229½ 7th Street, N.W., Officer Evans made number bets with Jane Doe #2. He gave her $.30 in payment for these bets. These bets were recorded in a regulation number book by Jane Doe #2 and a duplicate copy given to Officer Evans. Jane Doe #2 was observed writing numbers for several other people in the premises. About 1:25 P.M. Jane Doe #2 told John Doe #1, "It's time to get upstairs". At 1:30 P.M. Jane Doe #2 and John Doe #1 left the Cafe and entered a doorway 1229 7th Street, N.W. leading upstairs. Jane Doe #2 carried a brown paper bag containing the number work. About 2:18 P.M. Officer Evans observed John Doe #1 passing the front of the Cafe. He was followed to 614 N Street, N.W. About 8 minutes later John Doe #1 came out of 614 N Street, N.W., returned to 1229½ 7th St., N.W. where Jane Doe #2 was waiting for him.

About 1:15 P.M. January 15, 1958, while in 1229½ 7th St., N.W. Officer Evans made number bets with Jane Doe #2. He gave her $.30 in payment of these bets. She recorded these bets in a regulation number book and gave Officer Evans a duplicate slip. John Doe #1 was also observed on the premises. Jane Doe #2 was observed taking number bets from several other people in the premises.

About 1:05 P.M. January 16, 1958, while in the Cafe located at 1229½ 7th St., N.W. Officer Evans made number bets with Jane Doe #2. She recorded these bets in a regulation number book and gave Officer Evans a duplicate copy. Officer Evans paid her $.30 for these bets. Officer Evans observed Jane Doe #2 accepting number bets and recording them in a regulation book while in 1229½ 7th St. N.W. for forty minutes, from other males

and females. During this period, Officer Evans had a conversation with John Doe #1. John Doe #1 stated that Jane Doe #2 pays him $2.50 a day for running numbers. On some days he doesn't get to make any money from her because her old man does the running when he is around.

About 12:40 P.M. January 17, 1958, while in the Cafe located at 1229½ 7th St., N.W. Officer Evans made number bets with Jane Doe #2. She recorded these bets in a regulation number book and gave Officer Evans a duplicate copy. Officer Evans paid her $.25 for these bets. About 1:23 P.M. Jane Doe #2 and John Doe #1 left the cafe and went to 1229 7th St., N.W., upstairs. Jane Doe #2 had the brown paper bag containing the number work. About 2:43 P.M. John Doe #1 came into the Cafe and slipped a brown paper bag to John Doe #2, who had been identified as Jane Doe #2's old man. John Doe #2 then left the Cafe, with the bag in his possession.

About 1:14 P.M. January 18, 1958, Officer Evans met Jane Doe #2 in the Cafe 1229½ 7th St., N.W., and made number bets with her. Jane Doe #2 opened a brown paper bag in her arm, took out a regulation number book and recorded Officer Evans bets and gave him a duplicate copy. Officer Evans paid her $.30 for these bets. She placed the book in the bag and went out the door, and entered 1229 7th Street, N.W. stairway leading upstairs. About 2:25 P.M. Jane Doe #2 came downstairs and entered 1229½ 7th St., N.W. with a brown paper bag in her hand. At this time an unidentified colored male placed a bet with her. Jane Doe #2 took from the bag a regulation number book and recorded the bet. After this, she took a smaller bag out of the brown bag and placed a copy of the slip in this bag. She place a book in her coat pocket, then neatly folded the bag of slips. She placed them under her coat, which she held in place with folded arms. Jane Doe #2 then left the Cafe and was followed by Officer Evans to 614 N St., N.W. About 4 minutes later she emerged from 614 N St., N.W., her hands free, adjusting her cap with both hands and her coat was open. The bag which she had taken into 614 N St., N.W. was not seen, nor was there a bulge in her coat pockets. Officer Evans followed her back to 1229½

7th St., N.W. and sat talking with her until 3:30 P.M. About 3:40 P.M. Officer Evans and Jane Doe #2 went to New Republic Cafe in the 1200 block of 7th St., N.W.

About 1:15 P.M. January 20, 1958, Officer Evans observed Jane Doe #2 taking number bets in 1229½ 7th St., N.W. John Doe #1 told Officer Evans that he had to go around to the office and get some books for Jane Doe #2. About 8 minutes later John Doe #1 returned and gave Jane Doe #2 a stack of 4 or 5 unused number books. About 1:38 P.M. Officer Evans placed his number bets with Jan Doe #2 who recorded same in regulation number book and gave him a duplicate slip. Officer Evans gave her $.25 in payment of these bets. John Doe #1, Jane Doe #2 and two other unidentified colored females entered 1229 7th St., N.W. and went to the third floor, Room No. 3, which was John Doe #1's room. Jane Doe #2 sat on the bed and the two unidentified colored women took turns in calling off to Jane Doe #2 numerous numbers bets. Jane Doe #2 recorded these bets in a regulation number book. About 10 minutes later another unidentified colored female called "Big Ruth" came in. She brought a sheet of bets which Jane Doe #2 recorded on a regulation number book as they were read. An unidentified female colored, called "Anna" asked Jane Doe #2 if she wanted her to take it in for her (Anna), to which Jane Doe #2 replied, "I wish you would". Jane Doe #2 stacked the slips neatly and placed them in a small paper bag which she gave to Anna. Officer Evans observed Anna walk north on 7th Street to N Street, with numbers in her possession.

About 1:40 P.M. January 21, 1958, Officer Evans went to Room 3, 1229 7th St., N.W., where he contacted Jane Doe #2. He observed Jane Doe #2 seated on the bed, separating number slips. Officer Evans placed his bets with her, she recorded his bets in a regulation number book and gave him a duplicate copy. While in the premises Officer Evans observed other people turning in number books to Jane Doe #2. After sorting these slips, Jane Doe #2 placed them in a small paper bag and gave them to John Doe #2, who placed them in his pocket and left the room.

About 12:50 P.M. January 22, 1958, Officer Evans placed a number bet with Jane Doe #2. She recorded this bet in a regulation number book and gave Officer Evans a duplicate copy. Officer Evans paid her $.25 for this bet. About 1:50 P.M. Officer Evans went to Room 3, 1229 7th St., N.W., observed Jane Doe #2 sorting number slips.

On all occasions where a brown paper bag is mentioned, it is believed by the undersigned that they contained number slips or other gambling paraphernalia.

The undersigned Officer firmly believes based on his observations that number slips or other gambling paraphernalia is now being secreted in premises 1229 7th St., N.W., Room 3, and 614 N St., N.W., and that all the aforementioned persons are engaged in the operation of a policy lottery and other gambling activities in violation of the gambling laws of the District of Columbia.

/s/ JACK E. EVANS
Pvt. Jack Evans, MPDC
Moral Division

Subscribed and sworn to before
me this 23rd day of January, 1958.

s/ JAMES E. SPLAIN
D.C. Commissioner for the
District of Columbia.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

The Circuit Court of Appeals has decided a federal question in a way probably in conflict with applicable decisions of this Court.

Below, at page 2 of its "Reply To Answer To appellee's Motion To Affirm Or Dismiss", (Supp. Tr. 12) the United States District Attorney said, in part:

> The crux of the Government's contention is not bottomed upon the doctrine of finality nor due process, but is that Rule 41(e) F.R.C.P. affords ap-

pellant an adequate remedy at law and * * * warrants summary reversal upon the face of this record.

In Carrol v United States, 354 US 394, 1 L. ed 2d 1442, 1448, 1449, this Court said:

> It is true that certain orders relating to a criminal case may be found to possess sufficient independence from the main course of the prosecution to warrant treatment as plenary orders, and thus be appealable on the authority of 28 USC section 1291 without regard to the limitations of 18 USC Section 3731, just as in civil litigation orders of equivalent distinctness are appealable on the same authority without regard to the limitations of 28 USC 1292. * * * Earlier cases illustrated, sometimes without discussion, that under certain conditions orders for the suppression or return of illegally seized property are appealable at once, as where the motion is made *prior to indictment* * * *.

In Perlman v United States, 274 US 7, 62 L ed. 950, 955, where relief was sought in the same manner and fashion as in the instant cause, and for the same purpose, prior to indictment, this court said, in part:

> The second contention of the government is somewhat strange; that is, that the order granted upon its solicitation was not final as to Perlman, but interlocutory in a proceeding not yet brought and depending upon it to be brought. In other words, that Perlman was powerless to avert the mischief of the order, but must accept its incidence and seek a remedy at some other time and in some other way. We are unable to concur.

In Go-Bart Importing Co. v United States, 282 US 344, 75 L. ed 374 this Court held that a federal district court has jurisdiction to entertain a motion for an order in a criminal proceeding initiated by the filing of a complaint before a United States Commissioner and the issuance of an order of arrest by him, to enjoin the use as evidence of books and papers alleged to have been seized and taken

from the persons arrested, in violation of their constitutional rights.

In Gouled v United States, 255 US 298, 65 L ed 647, 654, where a rule of court and the constitutional rights guaranteed a defendant under amendments IV., and V., came into conflict, as is the case here, this Court said, amongst other things:

> * * * A rule of practice must not be allowed for any technical reason to prevail over a constitutional right.

The adjudications referred to above, by this Court, establishing in unequivocal fashion that the remedy here pursued by petitioner is proper and exists as a matter of right have not been overruled and no authority exists which can be claimed to amount to repeal of such right to relief.

The action taken below was plainly contrary to and in conflict with the law of the case as heretofore determined by this court.

The Court Below Lacked Authority To Summarily Dismiss The Instant Appeal.

Title 17-101 District of Columbia Code, 1940 Edition states that upon appeal taken to the Circuit Court of Appeals, said court:

> * * * shall review such order, judgment, or decree and affirm, reverse, or modify the same as shall be just * * *.

Upon appeal taken apellant is entitled as matter of right to file brief and have his cause determined by the court upon the basis of his brief and brief in opposition.

No authority was cited below justifying the summary procedure allowed in this case.

CONCLUSION

Petitioner earnestly contends that the judgment of the court below being plainly in conflict with applicable decisions of this court; and

It must be assumed that the claim of the Government that the crux of its motion for summary judgment being (Supp. Tr. 12) "not bottomed upon the doctrine of finality nor due process, but is that Rule 41(e) F.R.C.P. affords appellant an adequate remedy at law and * * * warrants summary reversal upon the face of this record" —plainly establishes the decision of the Circuit Court of Appeals means that in the view of that Court the statements and the law pronounced by this Court in Carrol v. United States, 354 U.S. 394, 1 L.ed 2nd, 1442, 1448, 1449, Perlman v. United States, 274 US 7, 62 L.ed. 950, 955, Go-Bart Importing Co., v. United States, 282 US 344, 75 L.ed. 374, and Gouled v. United States, 255 US 298, 65 L.ed. 647, 654, have been overruled by the Court Below. We submit that every action taken below was contrary to law; contrary to the Constitutional Provisions set forth supra; contrary to the applicable decisions of this Court; and that in the interests of orderly procedure below it is the duty of this Court to make clear to the Courts below that the position they have taken is untenable.

WHEREFORE the petitioner prays this Court to issue its writ of certiorari in the instant cause.

Respectfully submitted,

T. Emmett McKenzie,
412 Fifth Street, N.W.,
Washington, D.C.,
Counsel for Petitioner.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,459

April Term, 1958

District Court Grand Jury No. 194-58
Gertrude Arrington, Appellant,

v.

United States of America, Appellee.
Before: Edgerton, Chief Judge, and Washington and Danaher, Circuit Judges, in Chambers.

ORDER

Upon consideration of appellee's motion to affirm or dismiss, and of appellant's answer, it is

ORDERED by the court that the judgment of the District Court appealed from herein be, and it is hereby, affirmed.

Dated: June 5, 1958

Per Curiam.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Grand Jury No. 194-58

UNITED STATES OF AMERICA,

v.

GERTRUDE ARRINGTON,

MEMORANDUM

Gertrude Arrington has filed a motion to restore certain papers and monies taken from premises 614 N Street, N.W., and to restrain the use of these papers and monies

by the United States Attorney in any subsequent proceeding which may lead to the bringing of an indictment against her. Nowhere does the motion allege possession or ownership of the searched premises or the seized property. During oral argument on the motion it was brought out that petitioner is an employee in the premises 614 X Street, which is a valet shop.

The government has opposed the motion, alleging there was probable cause for the issuance of the search warrant and raising procedural objections to the motion. The government contends that the movant has not alleged ownership in, or the right to the possession of the premises searched or the property seized.[1] An employee of the store, they assert, does not have sufficient standing by that fact alone to object to the use of the papers and monies. This exact point has never been decided in this jurisdiction and an examination of federal cases in other jurisdictions discloses no precedent for this.[2] Therefore, while the Court feels that there may be merit to the government's argument, nevertheless, it will decide the motion on the merits.

The motion is cast in a form which addresses itself to the equity powers of the Court. In this respect the petitioner relies on *Go-Bart Importing Company, et al.*, v. *United States*[3] where a similar motion was sustained by

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[1] *Accardo* v. *United States* 247 F. 2d 568 (D.C.Cir. 1957).

[2] In *United States* v. *Blok* 88 App. D.C. 326, 188 F. 2d 1019 (1951) an employee was held to have standing to assert the improper search of her desk. For the rights of a servant, an employee living in another part of the building, see cases cited therein. On the rights of a guests *Gaskins* v. *United States* 95 App. D.C. 34, 218 F. 2d 46 (1955); and *Jeffers* v. *United States* 342 U.S. 48 (1951). However, there is still doubt whether this allegation alone, without any allegation of possession or ownership, is sufficient.

[3] 262 U.S. 344 (1930).

the United States Supreme Court because of an illegal search and seizure. That case, however, was decided before the promulgation of the Federal Rules of Criminal Procedure. The Court is of the opinion that the petitioner has an adequate remedy at law under Rule 41(e) and feels that procedure should be followed. Although there is a general lack of enthusiasm in the courts for a motion to suppress evidence filed at a pre-indictment stage, as in this case, the Court has treated the motion as one filed under Rule 41(e) and asking for relief provided therein.

Petitioner has cited *United States v. Price*,[5] a previous decision by this Court, as precedent for the case at bar. In the *Price* case bets were placed with a single person and observation made of this person alone over a period of time. He was seen to enter 1445 Swann Street and leave a few minutes later during the time (mid-afternoon) when numbers activity is conduced. No other suspicious person was ever seen entering the above premises nor was any contact between Price and any other person observed who might be connected with the Swann Street premises. There was nothing peculiar in Price's mannier or appearance from which to infer that his entrance into these premises was anything but innocent. The premises were owned by a person formerly convicted of numbers violations but no observation of him or whether he even lived in or visited Swann Street was alleged.

In the instant case, however, bets were made with four persons, two of whom were seen entering 614 N Street during the midafternoon hours. On three different occasions Officer Evans saw John Doe #1, with whom he personally had placed a bet and whom he had seen many times with Jane Doe #2, enter premises 614 N Street and leave three or four minutes later. Jane Doe #2, with

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[4] *Chieftain Pontiac Corporation* v. *Julian* 209 F. 2d 657 (CA 1 1954).

[5] 149 F. Supp. 707 (1957).

whom Officer Evans had placed a bet eight times and had been seen twice recording the bets of Officer Evans taken by others, was seen entering the premises once. And, as the Court indicates below, during this one visit there was good cause to believe that she left number slips in the premises. There is also the allegation, which the Court believes should be given some credence albeit since it is a conclusion, very slight, that the premises 614 N Street is a known numbers-drop location.

The key allegation, however, of the affidavit is the following:

> "* * * About 2:25 P.M. Jane Doe #2 came down stairs and entered 1229½ 7th St., N.W. with a brown paper bag in her hand. At this time an unidentified colored male placed a bet with her. Jane Doe #2 took from the bag a regulation number book and recorded the bet. After this, she took a smaller bag out of the brown bag and placed a copy of the slip in this bag. She placed a book in her coat pocket, then neatly folded the bag of slips. She placed them under her coat, which she held in place with folded arms. Jane Doe #2 then left the Cafe and was followed by Officer Evans to 614 N St., N.W. About 4 minutes later she emerged from 614 N St., N.W., her hands free, adjusting her cap with both hands and her coat was open. The bag which she had taken into 614 N St., N.W. was not seen, nor was there a bulge in her coat pocket."

It is the Court's opinion that this sufficiently distinguishes the instant case from the *Price* situation to warrant a different result.

It should be further noted that the bag Jane Doe #2 carried and what was in it is very definitely identified. Not only is there the allegation in the affidavit that "on all occasions where a brown paper bag is mentioned, it is believed by the undersigned that they contained number slips or other gambling paraphernalia", but also on four

other occasions mentioned in the affidavit Officer Evans saw slips placed in a paper bag and the bag folded. On the occasion when Jane Doe #2 went into 614 N Street, N.W. with a paper bag, there can be no doubt that the bag contained numbers slips. Her emergence without the bag, coupled with the other circumstances mentioned above, in the Court's opinion warrants a finding of probable cause.

The motion is denied.

s/ LUTHER W. YOUNGDAHL
Judge

March 1958

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Grand Jury No. 194-58

UNITED STATES OF AMERICA,

v.

GERTRUDE ARRINGTON

ORDER

The motion to restrain and enjoin, in the nature of a motion to suppress, having come before this Court, and after hearing argument on the motion and after a full and careful consideration of the motion and records of the case, for the reasons stated in the memorandum filed herewith, it is by the Court this 21st day of March, 1958,

ORDERED That the motion be and is hereby denied.

s/ LUTHER W. YOUNGDAHL
Judge

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 185

GERTRUDE ARRINGTON, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the Court of Appeals (Pet. 25) has not yet been reported. The memorandum opinion of the District Court (Pet. 25-29) is reported at 159 F. Supp. 843.

JURISDICTION

The order of the Court of Appeals affirming the judgment of the District Court was entered on June 5, 1958 (C.A. 14).[1] On July 7, 1958, Mr. Justice

[1] The transcript and supplemental transcript of record, paginated consecutively, will be referred to as "R.". The proceedings had in the Court of Appeals, separately numbered, will be referred to as "C.A.".

Clark extended the time for filing the petition for a writ of certiorari to July 18, 1958. The petition for a writ of certiorari was filed on July 17, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the search warrant is supported by a showing of probable cause.

STATEMENT

Petitioner has not yet been indicted or tried. The facts may be summarized as follows:

On January 23, 1958, Private Jack E. Evans, of the District of Columbia police force, made an affidavit substantially to this effect (R. 5, 13-16):

A complaint had been received of lottery violations in the 1200 block of 7th Street, N. W., Washington, D. C. (R. 13). While investigating this report, officer Evans made twelve number bets with "Jane Doe #2" at 1229½ 7th Street, N. W., and vicinity during the period January 9-22, 1958, and saw her accept bets from numerous other persons (R. 13-15). Officer Evans also placed two number bets with "John Doe #1", on January 11, 1958. He later saw two of these bets turned over to "Jane Doe #2" (R. 13). "John Doe #1" told Evans that "Jane Doe #2" employed him to run numbers (R. 14). Evans saw "John Doe #1" visit "Roy's Valet", 614 N Street, N. W., Washington, D. C., a known numbers "drop", three times during the period of investigation (R. 14). On January 18, 1958, Evans saw "Jane Doe #2" carefully

fold a bag which she had filled with numbers slips and place it under her coat, holding it in place with folded arms (R. 14-15). Evans followed the woman to 614 N Street, N. W., and watched her enter. About four minutes later she emerged from the business establishment with her hands free. She was adjusting her cap with both hands, and her coat was open. The bag of slips was not to be seen and her coat pockets did not bulge (R. 15).

On the basis of this affidavit, the United States Commissioner found probable cause to believe that gambling paraphernalia was being concealed at Roy's Valet, 614 N Street, N. W., Washington, D. C., and issued a search warrant for the premises (R. 3). $132.00 in bills and a quantity of "numbers slips and rundown tapes" were found during the search on January 24, 1958 (R. 4).

Petitioner was one of the two employees at the valet shop, and the property seized was inventoried in her presence (R. 4, 24). On January 27, 1958, a complaint was filed with the Commissioner charging petitioner with promoting a lottery and possessing number slips (R. 52). After appearing before the Commissioner, petitioner's preliminary hearing was continued until February 20, 1958 (R. 51).

On February 11, 1958, petitioner filed a motion in the United States District Court for the District of Columbia to restrain the use of the papers and money taken under the search warrant, alleging that there was no probable cause for the issuance of the search warrant (R. 6-12). The District Court treated the motion as one to suppress under Rule 41(e), F. R.

Crim. P., and held that the affidavit established sufficient probable cause for the issuance of the warrant. On March 17, 1958, it denied the motion to suppress (R. 24-28).

Petitioner appealed from the order denying her motion (R. 29). The government moved for summary affirmance or dismissal of the appeal in the Court of Appeals, contending that the appeal was premature, and that the District Court's ruling on probable cause was correct in any event (C.A. 1-5). After answer and reply, the Court of Appeals entered a *per curiam* order affirming the judgment of the District Court (R. 14).

ARGUMENT

Petitioner argues this case as though the Court of Appeals concluded that her appeal was premature. The fact is, however, that both the District Court and the Court of Appeals passed on the merits of her motion to suppress. The District Court expressly found that there was probable cause to justify issuance of the search warrant. On appeal, the government asked the Court of Appeals either to dismiss the appeal as premature or to affirm summarily the judgment of the District Court because the lower court was clearly correct on the issue of probable cause. The Court of Appeals chose to affirm the judgment below. There is thus no occasion to consider the questions of whether or not a motion to suppress may be made before indictment, and whether or not petitioner may appeal from an adverse ruling on her motion prior to trial on the merits. See *Carroll* v. *United States*, 354 U.S. 394, 403-405; *Go-Bart Im-*

porting Company et al. v. *United States*, 282 U.S. 344, 349-350.

The police officer's affidavit was clearly sufficient to show probable cause by federal standards. See *Brinegar* v. *United States*, 338 U.S. 160, 175-176. The officer spelled out the time, place, and detailed circumstances of numerous violations of the gambling laws by "Jane Doe #2", and explained with particularity the events which he had seen and which led to the conclusion that the premises at 614 N Street, N. W., were being used in the gambling operation. Judged by the strictest standards, there was enough before the Commissioner to support his finding of probable cause and to justify issuance of a search warrant. See *Giordenello* v. *United States*, No. 549, O.T. 1957, decided June 30, 1958.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

MALCOLM ANDERSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
EUGENE L. GRIMM,
Attorneys.

AUGUST, 1958.

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